BEFORE THE
PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NOS. 2021-143-E & 2021-144-E

In the Matters of: Application of Duke Energy Progress, LLC for Approval of Smart $aver Solar as Energy Efficiency Program Application of Duke Energy Carolinas, LLC for Approval of Smart $aver Solar as Energy Efficiency Program	**DUKE ENERGY PROGRESS, LLC'S AND DUKE ENERGY CAROLINAS, LLC'S:** **(I) MOTION TO AFFIRM LEGAL STANDARDS;** **AND** **(II) RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND MOTION REQUESTING ORAL ARGUMENT**

Pursuant to S.C. Code Ann. Regs. 103-829 and applicable South Carolina law, Duke Energy Carolinas, LLC ("DEC"), and Duke Energy Progress, LLC ("DEP" and together with DEC, the "Companies"), hereby (i) file this motion to affirm established legal standards and limit the testimony and evidence offered at the hearing in these proceedings to that which is consistent with the applicable legal standards, and (ii) respond in opposition to the ORS's Motion for Summary Judgment (the "Motion") and Motion Requesting Oral Argument (the "Request for Oral Argument") filed on September 27, 2021. As explained below, the Companies proposed Smart $aver Solar as Energy Efficiency Programs (collectively, the "Program") in these proceedings comply with well-settled tenets applicable to EE/DSM programs in South Carolina. For these reasons and those set forth below, the Companies respectfully request that the Commission issue an order declaring:

(1) The Commission will evaluate the Program under S.C. Code Ann. § 58-37-20 and the EE/DSM Mechanisms.

(2) The cost recovery for the programs proposed in these proceedings, as EE/DSM programs, will be governed by S.C. Code Ann. § 58-37-20 and the Commission-approved cost recovery Mechanisms, and therefore the lost revenue recovery provision contained within S.C. Code Ann. § 58-402-20(I) does not apply; testimony and evidence presented at the hearing will be limited to that which comports with the applicable legal standards.

(3) The UCT test is the determinative test for testing the cost-effectiveness of EE/DSM programs, and all testimony and evidence presented at the hearing will be limited to that which comports with the applicable cost-effectiveness test.

(4) The Motion for Summary Judgment and Request for Oral Argument are denied.

I. STATEMENT OF THE CASE

The Companies have proposed in these proceedings a Program under S.C. Code Ann. § 58-37-20 and the Commission-approved cost recovery mechanisms (the "Mechanisms") for EE/DSM approved through Order Nos. 2021-32 and 2021-33, issued in Docket Nos. 2013-298-E and 2015-163-E, respectively. The Companies' filings in these proceedings evidence a deliberate effort by the Companies to design the Program to achieve the thresholds required of EE/DSM programs in South Carolina—including this Commission's recent order concluding that behind-the-meter consumption of solar energy is equivalent to EE. The Program consists of a package of requirements and features that work together to cost-effectively reduce customers' grid energy usage. Likewise, the Companies provided data-driven analyses proving that the Program well exceeds the applicable threshold under the Utility Cost Test ("UCT")—which is the critical test for determining program cost-effectiveness when evaluating the Program under South Carolina law. The Program also complies with the other requirements of the applicable EE/DSM

Mechanisms, including those related to commercial availability and maturity. These requirements represent the comprehensive set of laws and regulations applicable to EE/DSM programs.

Despite these facts, in its testimony and other filings, the ORS ignores the requirements of the Mechanisms and disregards the fact that, as explained below, S.C. Code Ann. § 58-37-20 casts a wide net for demand-side programs. Instead, the ORS applies selective criteria related to the Companies' Solar Choice net energy metering ("NEM") programs as an additional requirement on the Companies' Program. ORS's application of select criteria from S.C. Code Ann. § 58-40-20 to the Program misapplies a narrow limit on the recovery of lost revenue—applicable only to Solar Choice programs—to the Companies' EE/DSM Programs. It is only through this misapplication of law that the ORS now argues in its Motion that the Commission should deny the Companies' applications entirely. As a result, the Companies respectfully request that the Commission (i) affirm established legal standards and limit testimony offered at the hearing to that which is consistent with the applicable legal standards, and (ii) deny the Motion and Request for Oral Argument.

II. RELEVANT BACKGROUND

The ORS's testimony in this matter and corresponding Motion omit key details about not only the background of the Program and Solar Choice, but also the General Assembly's stated vision for a clean energy future in South Carolina under Act 62, which includes promoting "energy efficiency, demand response, or onsite distributed energy resources in order to reduce consumption of electricity from the electrical utility's grid." S.C. Code Ann. § 58-27-845(B). Viewed as a whole, the ORS's misapplication of South Carolina law and this Commission's precedent is made clear.

A. Overview of Act 62's stated goals for clean energy and energy efficiency.

The Governor signed Act 62 into law on May 16, 2019. Dubbed the "Energy Freedom Act," the General Assembly directed the Commission to "address all renewable energy issues in a fair and balanced manner" while properly reflecting, among other things, "the benefits of customer renewable energy, energy efficiency, and demand response." S.C. Code Ann. § 58-27-845(B). In so doing, the General Assembly stated its desire to advance South Carolina into a cleaner-energy future on multiple fronts. In contemplating the evolving energy landscape in South Carolina resulting from Act 62, the Commission enumerated several "critical" needs to be addressed going forward. These needs are outlined in S.C. Code Ann. § 58-27-845 and include the need to:

> (1) protect customers from rising utility costs;
> (2) provide opportunities for customer measures **to reduce or manage electrical consumption from electrical utilities in a manner that contributes to reductions in utility peak electrical demand** and other drivers of electrical utility costs; and
> (3) equip customers with the information and ability to manage their electric bills.

S.C. Code Ann. § 58-27-845(A). (emphasis added).

The General Assembly goes on to state that:

> Every customer of an electrical utility has the right to a rate schedule that offers the customer a reasonable opportunity to employ such energy and cost-saving measures as **energy efficiency, demand response, or onsite distributed energy resources in order to reduce consumption of electricity from the electrical utility's grid and to reduce electrical utility costs**.

S.C. Code Ann. § 58-27-845(B). (emphasis added).

Further evidencing the wide-ranging approach that the General Assembly envisions for South Carolina, the General Assembly directed utilities in this state to develop Integrated Resource Plans that evaluate "the adoption of renewable energy and cogeneration, energy efficiency, and demand response measures" while specifically considering "customer energy efficiency and demand response programs." S.C. Code Ann. § 58-37-40(B)(1)(e). Likewise, and as discussed

below, the General Assembly mandated that the Commission usher in a new era of NEM in South Carolina, with the specific intent of "**reducing regulatory and administrative burdens** to customer installation and utilization of onsite distributed energy resources . . . [and] **avoid disruption** to the growing market for customer-scale distributed energy resources." S.C. Code Ann. § 58-40-20(1) and (2). (emphasis added).

Taken together, these provisions within Act 62 evidence the General Assembly's desire to provide customers with access to a wide array of measures and opportunities that can be utilized together to implement clean energy and enhanced efficiency measures.

B. <u>The Program</u>.

The Companies submitted an Application in these proceedings seeking approval of the Program and inclusion of the same in the Companies' suite of EE/DSM programs beginning January 1, 2022. The Program proposed by the Companies in these dockets arises under S.C. Code Ann. § 58-37-20 and Commission Order Nos. 2021-32 and 2021-33.

At a high level, the Program encourages behind-the-meter generation and a corresponding reduction in energy consumption by incentivizing the installation of solar photovoltaic ("PV") facilities and smart thermostats at residential premises. As explained by the Companies' Witness Shafer, the Program would provide an upfront rooftop solar incentive of $0.36/Watt-DC to eligible customers. Witness Duff, General Manager Grid Strategy and Enablement, proffered testimony on behalf of the Companies explaining in detail how the Program complies with South Carolina law. Companies' Witness Duff explained that the Program is "designed to incentivize customers to reduce their energy consumption and—by incentivizing the installation of solar PV facilities—the Program allows customers to reduce their energy consumption from the grid." Duff Direct Testimony at p. 4, ll. 15-17. The Program also aligns with the characteristics of the Companies'

other EE programs and measures. For example, the Program contains incentives for home equipment that promote reduced energy consumption from the grid, just like other EE/DSM programs, including, but not limited to, those related to high efficiency heat pumps and water heaters.[1] Companies' Witness Duff explains the Program is designed to "cost-effectively incentivize customers to install environmentally acceptable physical equipment that will reduce their energy consumption or demand in compliance with the statute." Duff Direct Testimony at p. 5, ll. 14-16. Finally, Companies' Witness Duff explains that the Commission has approved other solar PV programs as an EE/DSM program, and that if the Program is approved, the Companies expect that all of their customers will realize benefits given that the costs avoided as a result of the Program significantly outweigh the costs of implementing the Program. *See* Duff Direct Testimony.

Solar Choice customers are not required to participate in the Program. However, if a Solar Choice customer elects to participate in the Program, that customer must also enroll in the Companies' Commission-approved winter-focused Power Manager Load Control Service Rider (the "Winter BYOT Program"). In short, the Program provides customer and system benefits—all in accordance with the Commission-approved EE/DSM Mechanism. As such, the Companies propose to recover all costs incurred by the Companies and associated with the Program through the Companies' EE/DSM rider in accordance with the Commission-approved EE/DSM Mechanism—just like other EE/DSM program costs.[2] The Applications request that the Commission approve the Program with an effective date of January 1, 2022.

[1] The Companies' suite of Smart $aver home improvement rebate programs offer incentives for customers to install energy efficient equipment, such as HVAC, water heaters, and pool pumps.

[2] The EE/DSM Mechanism was adopted by the Commission through Order No. 2021-33 in Docket No. 2015-163-E.

C. Solar Choice.

Solar Choice is a successor NEM program that arises under S.C. Code Ann. § 58-40-20(F)(1), as implemented by Act 62. Specifically, Act 62 required the Commission to establish a new generation of NEM in South Carolina. In transitioning to the next generation of NEM, the General Assembly transitioned from the incentive structure provided in Act 236, to more complex rate tools—like a time-variant rate design—all while allowing customer generators to consume energy behind the meter without penalty. *See* S.C. Code Ann. § 58-40-20(F)(3)(b); S.C. Code Ann. § 58-40-20(G)(2). To effectuate this transition in structure, Act 62 expressly addressed the issue of lost revenue. Specifically, Act 62 prohibited the Companies from recovering lost revenues associated with the Solar Choice Tariffs established pursuant to S.C. Code Ann. § 58-40-20(I). This represented a change in the law with respect to NEM programs given that the Companies' previously-established NEM programs under Act 236 are under no such restriction. Act 62 made clear that this restriction applies only to the Solar Choice programs, which are established for customers submitting applications on or after June 1, 2021. Specifically, S.C. Code Ann. § 58-40-20(I) states that:

> Nothing in this section, however, prohibits an electrical utility from continuing to recover distributed energy resource program costs in the manner and amount approved by Commission Order No. 2015-194 for customer-generators applying before June 1, 2021. Such recovery shall remain in place until full cost recovery is realized. Electrical utilities are prohibited from recovering lost revenues associated with customer-generators who apply for customer-generator programs on or after June 1, 2021.

On November 2, 2020, the Companies submitted applications for approval of the Solar Choice Tariffs in Docket Nos. 2020-264-E and 2020-265-E pursuant to S.C. Code Ann. § 58-40-20 (the "Solar Choice Applications"). On May 30, 2021, the Commission issued Order No. 2021-390, the ("Solar Choice Order") which approved the Companies' residential and non-residential Solar

Choice Tariffs. The Commission found, among other items, that the Solar Choice Tariffs serve as a "a platform for customers to adopt other DERs in the future, including energy efficiency measures and battery storage." Solar Choice Order at 42.

III. MOTION TO AFFIRM ESTABLISHED LEGAL PRINCIPLES AND LIMIT TESTIMONY TO THAT WHICH IS CONSISTENT WITH THE APPLICABLE LEGAL STANDARDS

The Companies first seek affirmation from the Commission that the Program will be reviewed by the Commission under S.C. Code Ann. § 58-37-20 and the EE/DSM Mechanisms. The Program consists of a package of requirements and features that work together to cost-effectively reduce customers' grid energy usage. In its testimony and other filings, ORS ignores the requirements of the Mechanisms and disregards the fact that S.C. Code Ann. § 58-37-20 casts a wide net for DSM programs.

Second, the Companies seek affirmation that S.C. Code Ann. § 58-37-20 and the EE/DSM Mechanisms approved by the Commission govern the Companies' cost recovery related to these EE/DSM Program, rather than certain portions of Act 62 selected by ORS. The Program proposed in these proceedings arises under S.C. Code Ann. § 58-37-20 and the Commission-approved EE/DSM Mechanism, which contain specific provisions related to cost recovery. In its pre-filed direct testimony and Motion for Summary Judgment, ORS applies selective criteria related to the Companies' Solar Choice programs as an additional requirement on the Program. ORS's application of Solar Choice criteria to the Program misapplies a narrow limit on the recovery of lost revenue—applicable only to Solar Choice programs—to the Companies' EE/DSM Program. The Companies seek an order from this Commission affirming that the limit of lost revenue recovery under Solar Choice is inapplicable to EE/DSM programs, particularly to the Program as proposed.

Third, the Companies seek affirmation from the Commission instructing the parties to apply the UCT as the determinative test for determining program cost-effectiveness when evaluating the Program.

Finally, the Companies believe that all testimony, evidence, and arguments presented at the hearing in these proceedings should be limited to that which is consistent with the applicable legal standards.[3] ORS's consistent focus on the wrong requirements and standards confuses the issues and will unnecessarily burden the Commission's fair and impartial evaluation of the evidence in this case. Additionally, were the Commission to agree with ORS and modify the EE/DSM Mechanisms in these proceedings—by barring the recovery of net lost revenues and applying a different cost-effectiveness test than provided for in the Commission-approved Mechanisms—such would upend the recent Commission-approved settlements entered into in the Companies' Mechanism dockets, Docket Nos. 2013-298-E and 2015-163-E, and amount to arbitrary and capricious decision-making in violation of the S.C. Administrative Procedures Act.

A. Affirmation that the Program will be evaluated as an EE/DSM Program.

The Companies seek affirmation that the Commission will evaluate the Program under S.C. Code Ann. § 58-37-20 and the EE/DSM Mechanisms. S.C. Code Ann. § 58-37-20 authorized the establishment of the EE/DSM Mechanism, i.e., "procedures that encourage electrical utilities . . . to invest in cost-effective energy efficient technologies and energy conservation programs." The statute provides that such procedures or mechanisms "must[] provide incentives and cost recovery for energy suppliers and distributors who invest in **energy supply and end-use technologies** that

[3] Pursuant to 12(f), SCRP, "[u]pon motion pointing out the defects complained of, and made by a party before responding to a pleading…the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Rule 12(f), SCRCP. "A motion to strike is addressed to the sound discretion of the Circuit Judge." J. M. S., Inc. v. Theo, 241 S.C. 394, 397, 128 S.E.2d 697, 698 (1962).

are cost-effective, environmentally acceptable, and **reduce energy consumption or demand** . . . ." (emphasis added). The Program proposed in this case fits squarely within these parameters. A customer's solar PV system reduces *consumption* from and *demand* on the utility's electric grid due to customers' behind-the-meter consumption of solar PV energy. The term "demand" is well understood to mean "demand on the utility's system," and is also sometimes referred to as "load." *See, e.g.*, Order No. 2021-447 at 2, Docket Nos. 2019-224-E & 2019-225-E (June 28, 2021) ("Integrated Resource Planning is a structured, transparent process for comparing options to meet electric demand."); Horii Direct Test. at p. 28, ll. 19-21, Docket No. 2019-182-E (Oct. 8, 2020) ("[I]t is the individual peak demand on individual distribution equipment, or aggregate peak demand on a small group of distribution equipment that causes the need for capacity additions."). In fact, the Commission recently concluded that "behind-the-meter [solar energy] consumption is equivalent to energy efficiency . . . ," a conclusion that is consistent with S.C. Code Ann. § 58-37-20. Order No. 2021-569 at 47, Docket No. 2019-182-E (Aug. 19, 2021).

Not only does residential solar PV fit logically under S.C. Code Ann. § 58-37-20, the Program proposed in these proceedings actually consist of a **package** of requirements and features that work together to cost-effectively reduce customer demand; these requirements and features include the following:

- Customers must own an individually metered residence and install a solar PV system;
- Customers must participate in the Companies' Winter Bring Your Own Thermostat demand response program;
- To maximize savings, participants must be all-electric customers; and

- Participating customers are subject to EE/DSM evaluation, measurement, and verification, pursuant to the EE/DSM Mechanisms, to validate savings (which will inform the Companies' cost recovery).

These features are vital elements of the proposed Program, and they collectively and synergistically result in avoided electricity production, capacity, and transmission and distribution costs.

Finally, as discussed in Witness Duff's rebuttal testimony filed in these proceedings, just three years ago, the Companies obtained approval for a modification to their Nonresidential Smart $aver® Performance Incentive Program that included adding eligibility for combined heat and power ("CHP") systems to the Companies' suite of EE/DSM programs.[4] The ORS filed a letter in those dockets on March 13, 2018 explicitly discussing the CHP-related provision and informing the Commission that it did not oppose the modification. ORS Letter, Docket Nos. 2013-298-E & 2015-163-E (Mar. 13, 2018) ("The modifications proposed for [the Nonresidential Smart $aver® Performance Incentive Program] include the addition of CHP eligibility provisions providing that the energy efficiency associated with a newly constructed non-utility owned CHP system sited on a customer's premise will be eligible for consideration under the program."). Through Order Nos. 2018-179 and 2018-181, the Commission approved the proposed modifications. Just as the reduction in energy consumption from the grid being evaluated under the proposed Program is associated with converting the sun's energy into electricity, the Nonresidential Smart $aver® Performance Incentive Program recognizes the reduction in energy consumption from the grid associated with the electricity generated from CHP units.

[4] DEC Filing, Docket No. 2013-298-E (Feb. 23, 2018); DEP Filing, Docket No. 2015-163-E (Feb. 23, 2018).

The Program proposed in these proceedings is also analogous to the Companies' DSM load curtailment programs that permit customers to self-consume energy from on-site backup generation, while, as part of the same program, being subject to load curtailment requirements. This combination of features—self-consumption of behind-the-meter generation and load curtailment by the utility—results in a synergistic reduction in demand from the grid, and these programs have been part of the Companies' Commission-approved EE/DSM offerings since at least 2009 under PowerShare for DEC and CIG Demand Response for DEP. *See* Order No. 2009-336, Docket No. 2009-166-E (May 19, 2009) (approving, among others, DEC's PowerShare program); Order No. 2009-374, Docket No. 2009-190-E (June 26, 2009) (approving, among others, DEP's CIG Demand Response program under the Demand Response Automation tariff).

The Program proposed in these proceedings is proposed under S.C. Code Ann. § 58-37-20, it fits squarely under that statute, is consistent with previous analogous EE/DSM offerings, and it should be evaluated by the Commission accordingly. An affirmation on this point is necessary to allow the parties to efficiently proceed at a hearing in this matter. All testimony and evidence presented at the hearing should be limited to that which comports with the applicable legal standards.

B. <u>Affirmation that S.C. Code Ann. § 58-37-20 and the Mechanisms apply to the Program's cost-recovery rather than provisions of S.C. Code Ann. § 58-40-20</u>.

The Companies also seek affirmation that S.C. Code Ann. § 58-37-20 and the EE/DSM Mechanisms approved by the Commission governs the Companies' cost recovery related to this EE/DSM Program, rather than certain portions of Act 62 selected by ORS. S.C. Code Ann. § 58-37-20 <u>mandates</u> that utilities' "net income . . . is at least as high as the net income would have been if the energy conservation measures had not been implemented." This "net income" is referred to in the Commission-approved Mechanisms as "net lost revenues." Because the EE/DSM statute

and Mechanisms apply to the proposed Program, the Companies are authorized to the recovery provided for by the Commission under those provisions, including as to the net income or net lost revenues that will result from the Program's implementation. While the terms may be confusing, "net income" or "net lost revenues" in the EE/DSM context (i.e., as described in S.C. Code Ann. § 58-37-20 and the Commission-approved EE/DSM Mechanisms) are entirely distinct from "lost revenues" as contemplated in Act 62, S.C. Code Ann. § 58-40-20. This is explained in more detail below and in the pre-filed rebuttal testimony of Leigh Ford. ORS ignores the net lost revenue provisions of S.C. Code Ann. § 58-37-20 and the Commission-approved Mechanisms, and instead asserts that a select portion of Act 62 acts to effectively annul the mandated recovery of net income provided for in S.C. Code Ann. § 58-37-20. That provision of Act 62 does not apply in this case.

By way of background, in 2014, the South Carolina General Assembly codified the existing NEM programs ("Existing NEM Programs") by adding a new Chapter 40 to Title 58 as part of the South Carolina Distributed Energy Resource Act, S.1189 ("Act 236"). Among other things, Act 236 allowed utilities to collect lost revenues associated with the NEM-DER program under South Carolina's Fuel Clause. As described above, Solar Choice was established as the most recent iteration of NEM programs in South Carolina, arising under S.C. Code Ann. § 58-40-20, as implemented by Act 62. In transitioning to the next generation of NEM through Solar Choice, the General Assembly created a distinction in cost recovery mechanisms between Existing NEM Programs and the Solar Choice programs. This is codified in S.C. Code Ann. § 58-40-20(I), which clarifies the distinction between cost recovery under Existing NEM Programs and going forward under Solar Choice:

> Nothing in this section, however, prohibits an electrical utility from continuing to recover distributed energy resource program costs in the manner and amount approved by Commission Order No. 2015-194 for customer-generators applying before June 1, 2021. Such recovery shall remain in place until full cost recovery is

> realized. Electrical utilities are prohibited from recovering lost revenues associated with customer-generators who apply for customer-generator programs on or after June 1, 2021.

Act 62 makes clear that, while, the Companies are allowed to recover lost revenue under the Existing NEM Programs, they may not account for and recover similar lost revenues resulting from new Solar Choice customers. This narrow restriction only modifies NEM recovery and does not affect or modify the Companies' EE/DSM cost recovery that was established under a separate statute and through the Commission-approved EE/DSM cost recovery Mechanisms.

The Program proposed by the Companies in these dockets does not arise under Solar Choice, but instead arises under S.C. Code Ann. § 58-37-20, which was not modified by Act 62. ORS conflates the restriction on Solar Choice lost-revenue recovery and imposes an additional obligation on the Program that is inapplicable. The prohibition on the recovery of lost revenues arising under Act 62 was ushered in with a suite of other NEM-related provisions and, when viewed under accepted statutory interpretation principles, was not intended to affect or modify existing cost recovery mechanisms under EE/DSM programs.

In addition to the "lost revenues" contemplated in S.C. Code Ann. § 58-40-20 being distinct from "net income" contemplated in S.C. Code Ann. § 58-37-20, the caselaw of this state "presume[s] that the Legislature is familiar with prior legislation [i.e., the EE/DSM statute], and that if it intends to repeal existing laws it would . . . expressly do so; hence, if by any fair or liberal construction two acts may be made to harmonize, no court is justified in deciding that the later repealed the first." *Hodges v. Rainey*, 341 S.C. 79, 88–89, 533 S.E.2d 578, 583 (2000). In passing the more recent Act 62, the General Assembly would have been aware of the explicit requirement that utilities be permitted to recover net income associated with programs arising under S.C. Code Ann. § 58-37-20, and would not have repealed that requirement by implication. Because the

Program in these proceedings is an EE/DSM program and not a Solar Choice program, the statutes must be construed to permit the recovery of net income consistent with S.C. Code Ann. § 58-37-20.

Act 62 does not modify existing cost recovery under EE programs, and applying S.C. Code Ann. § 58-40-20(I) to EE/DSM programs violates a fundamental principle of statutory interpretation—*pari materia*. Specifically, *pari materia* is a principle of statutory construction that reflects a "practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context." *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972). The Program arises under S.C. Code Ann. § 58-37-20, which does not make reference to "lost revenues," but instead authorizes the recovery of "net income." As such, the Companies currently recover "net" lost revenue under EE programs (i.e., "net income" as contemplated by S.C. Code Ann. § 58-37-20). The principle of *pari materia*, as applied to these statutes, suggests that if the General Assembly had intended to prohibit the Companies from recovering net lost revenue under EE programs going forward by operation of S.C. Code Ann. § 58-40-20(I), it would have used the same term used in S.C. Code Ann. § 58-37-20—the statute that currently authorizes recovery of net lost revenues under EE programs.

ORS's continued misapplication of Solar Choice principles to the Program confuses the issues in these proceedings. As such, the Companies seek an order clarifying that the Solar Choice provision related to lost revenues under S.C. Code Ann. § 58-40-20(I) is inapplicable to EE/DSM programs arising under S.C. Code Ann. § 58-37-20. This clarification is necessary to allow the parties to efficiently proceed at a hearing in this matter. All testimony and evidence presented at the hearing should be limited to that which comports with the applicable legal standards.

C. <u>Affirmation of the use of the UCT cost-effectiveness test</u>.

The ORS attempts to apply the Total Resource Cost test (the "TRC") and the UCT to the Program on an equal basis, although South Carolina law makes clear that the determinative cost test is only the UCT. ORS's application of the TRC to the Program on equal footing with the UCT, through Brian Horii's pre-filed direct testimony, ignores the Commission-approved settlements ORS entered into in December 2020, approved January 2021, in Docket Nos. 2013-298-E and 2015-163-E, which evidence that the determinative test under South Carolina law is the UCT. In fact, Order No. 2021-33 noted that the approved settlements declared the UCT as the "primary" cost test for evaluating EE/DSM programs in South Carolina. Order No. 2021-33 at 2, Docket No. 2015-163-E (January 15, 2021). The UCT was reaffirmed by the Commission in the Companies' Integrated Resource Planning proceedings, requiring that the UCT be used in all "future IRPs, IRP updates, and market potential studies . . . to determine achievable [EE/DSM] potential." Order No. 2021-447 at 15, Docket Nos. 2019-224-E & 2019-225-E (June 28, 2021). In addition to the UCT now being the determinative cost-effectiveness test for EE/DSM programs, the UCT is the most useful test to be used in these proceedings because it considers the Program from the perspective of a utility investment on behalf of customer in a demand-side resource compared to the costs of a supply-side investment made by a utility on behalf of customers. The Companies seek an order from the Commission instructing the parties to utilize the UCT test as determinative for all EE/DSM programs. This affirmation is necessary to allow the parties to efficiently proceed at a hearing in this matter. All testimony and evidence presented at the hearing should be limited to that which comports with the applicable cost-effectiveness test.

D. <u>Conclusion</u>.

The Program proposed in these proceedings was properly filed pursuant to S.C. Code Ann. § 58-37-20. As such, and explained above, the Companies respectfully request that the Commission issue an order declaring:

(1) The Commission will evaluate the Program under S.C. Code Ann. § 58-37-20 and the EE/DSM Mechanisms.

(2) The cost recovery for the programs proposed in these proceedings, as EE/DSM programs, will be governed by S.C. Code Ann. § 58-37-20 and the Commission-approved Mechanisms, and therefore the lost revenue recovery provision contained within S.C. Code Ann. § 58-402-20(I) does not apply; testimony and evidence presented at the hearing will be limited to that which comports with the applicable legal standards.

(3) The UCT test is the determinative test for testing the cost-effectiveness of EE/DSM programs, and all testimony and evidence presented at the hearing will be limited to that which comports with the applicable cost-effectiveness test.

IV. RESPONSE IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT.

The Motion seeks for this Commission to dismiss the Companies' Applications in these dockets by claiming that there is no dispute that the Program falls within the Solar Choice program. In fact, the Companies, through testimony filed in these proceedings, do dispute that claim. As made clear above, the Program proposed in these proceedings was proposed under S.C. Code Ann. § 58-37-20—the EE/DSM statute—not the Solar Choice statute; the Program consists of a **package** of requirements and features, including solar PV systems, that work together to cost-effectively reduce customer demand; and the applications and testimony filed in these proceedings are entirely distinct from those filed in the Solar Choice proceedings. As made clear above,

because the Program is an EE/DSM program, the Companies are entitled to the cost recovery provided for in the applicable statute (S.C. Code Ann. § 58-37-20) and in the Commission-approved Mechanisms.

The Motion simply attempts to maneuver away from the numerous, substantive disputes among the parties, and seeks for this Commission to deny the Applications based on a narrow and disputed characterization of the record before this Commission and ignores the Commission's stated position that behind-the-meter consumption arising from solar generation "shall be treated as energy efficiency or demand-side management resources." Order No. 2021-569 at 52, Docket No. 2019-182-E (August 19, 2021) (the "Generic Order"). As such, the Motion cannot pass the threshold legal standards under South Carolina law and it must be denied.

A. <u>Legal standard</u>

Rule 56 of the South Carolina Rules of Civil Procedure allows for summary judgment only where "no genuine issue as to any material fact **and** that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP (emphasis added).[5] "Summary judgment should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law." *Fleming v. S.C. Dept. of Corrections*, 952 F.Supp. 283, 286 (S.C. 1996); *see also Evening Post Publ'g Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 82 (2011) ("Summary judgment is not appropriate where further inquiry into the facts is desirable to clarify application of the law."). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on

[5] "Although the South Carolina Rules of Civil Procedure have only been adopted by the Commission for discovery matters not covered in Commission Regulations, as per S.C. Code Ann. Regs. 103-835, the Commission has in practice ruled on Motions for Summary Judgment on numerous occasions." Order No. 2020-840 at 4, Docket No. 2020-125-E (December 30, 2020).

disputed factual issues. *Helena Chemical v. Allianz Underwriters*, 357 S.C. 631, 644 (2004). Under the summary judgment standard, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Id.* Finally, at the summary judgment stage, every benefit of the doubt is given to the party opposing summary judgment, and it is only necessary for the non-moving party to submit a **scintilla of evidence** warranting determination by the factfinder for summary judgment to be denied. *Evening Post Publ'g Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 82 (S.C. 2011) (emphasis added).

B. Argument

The Motion should be denied on numerous and independent grounds, all as detailed below.

a. The Motion must be denied because there are genuine issues of material fact.

i. The Companies dispute that the Program is indistinguishable from Solar Choice.

The ORS states in its Motion that the Companies "make clear that these Programs fall within the Solar Choice Program" and that this is an "undisputed" fact. Motion at 3. However, the Companies' own testimony in these proceedings evidences numerous occasions where the Companies dispute this very issue and make clear that the Program does not fall within the Solar Choice Program—undercutting the very basis for the Motion. In particular, as evidenced by the applications and pre-filed testimony, the Program proposed in these proceedings was proposed under S.C. Code Ann. § 58-37-20—the EE/DSM statute—not the Solar Choice statute; and the Program consists of a **package** of requirements and features, including solar PV systems, that work together to cost-effectively reduce customer demand.

Further, the Companies' Witness Ford explains that characterizing the Program as indistinguishable from Solar Choice is simply "inaccurate." Ford Rebuttal Testimony at p. 7, l. 18. Witness Ford explains that although "being a Solar Choice Metering customer is a requirement for

enrollment in the Program, they are not the same." Ford Rebuttal Testimony at p. 7, ll. 18-19. (emphasis added). Companies' Witness Huber cites the Commission's order in the Solar Choice Dockets as evidence that the Companies clearly envisioned the two programs as separate, even as far back as the Solar Choice Dockets, by designing the Solar Choice Tariffs to take advantage of solar's ability to operate as EE "in multiple contexts and programs." Huber Rebuttal Testimony at p. 7, l. 6. Likewise, in each docket, the Companies presented a different application, with different witnesses supporting each application—further evidencing the treatment of these programs as distinct. In the Solar Choice Dockets, as recognized by the Commission, the Companies designed the Solar Choice Tariffs to work in tandem with "**other** DERS in the future, **including energy efficiency** measures and battery storage." Solar Choice Order at 42. (emphasis added). The Companies made clear in the Solar Choice Application that Solar Choice customers would be eligible, but not required, to participate in the separate "solar-based **energy efficiency ("EE")/demand-side management ("DSM") programs**." Solar Choice Application at 4. (emphasis added).[6] The Companies expressly stated that such programs would "be the subject of other dockets in South and North Carolina." *Id*.

Further disputing the ORS's statement that the Companies somehow portrayed the Program as indistinguishable from Solar Choice, Companies' Witness Huber explained that there are separate considerations applicable to Solar Choice under South Carolina law, and Witness Ford explains that those requirements are inapplicable to the Program and corresponding cost recovery proposed in these proceedings. *See* Huber Rebuttal Testimony; Ford Rebuttal Testimony. In all, the Companies' testimony evidences a clear and consistent approach on the part of the

[6] The Companies note that although Solar Choice customers are not required to participate in the Program, once a customer elects to do so, they are required to participate in the Winter BYOT Program.

Companies—even prior to these proceedings—to describe the EE measures proposed in these proceedings as separate and distinct from the Solar Choice Program. This clearly disputes the ORS's allegation that there is no genuine issue of material fact related to the characterization of the Program. As such, the Motion should be denied.

ii. The Companies dispute that the Program fails to achieve applicable EE/DSM standards.

The Applications, the Companies' supporting testimony, and intervenor testimony in these proceedings support adoption of the Program given that it fulfills the relevant EE/DSM standards under South Carolina law and Commission precedent. The Applications include supporting testimony that the Program achieves the applicable EE/DSM standards because the Program: (1) is commercially available and sufficiently mature; (2) is applicable to the Companies' service area demographics and climate; (3) is feasible for a EE/DSM program in as much as solar PV is installed on the Companies' systems; and (4) passes the applicable cost-effectiveness screen. Intervenors also submitted testimony requesting that the Commission approve the EE/DSM measure proposed in this docket given that "it meets the purposes and definitions of an energy reduction or efficiency program, that it is beneficial for ratepayers as a whole, and is in the public interest." Moore Direct Testimony at p. 8, ll. 8-10.

One such example of a genuine issue of material fact relating to the Program as an EE/DSM program involves the appropriateness of the UCT in evaluating the Program. The Companies' Witness Duff states that the Program "must be evaluated under the [UCT] and receive a score of at least 1.0" in order to be approved by the Commission. Duff Direct Testimony at p. 7, ll. 16-17. In support of this statement, Witness Duff points to Commission Order Nos. 2021-32 and 2021-33, which approved settlement agreements among the Companies and several other parties—including the ORS—that stipulated "all Programs submitted for approval will have a Program-

level UCT result of greater than 1.0." Order No. 2021-32 at Exhibit 1, p. 32, Docket No. 2013-298-E (Dec. 4, 2020); Order No. 2021-33 at Exhibit 1, p. 35, Docket No. 2015-163-E (Dec. 4, 2020). In fact, in Order No. 2021-33, the Commission approved DEP's request that the UCT be utilized as the "primary" cost test for evaluating its EE/DSM programs in South Carolina. Order No. 2021-33 at p. 2, Docket No. 2015-163-E (Dec. 4, 2020). Witness Duff goes on to explain that the Program's UCT score well-exceeded 1.0 for both DEC and DEP. *See* Duff Rebuttal Testimony.

The ORS submitted testimony which directly addressed the Program as a proposed EE/DSM program, and directly disputed the whether the Program passes certain tests used to demonstrate cost-effectiveness. While, Witness Horii acknowledges the Commission's prior EE/DSM orders, he disputes that the UCT is the determinative cost test in South Carolina. Contrary to Witness Duff and the cited Commission orders, Witness Horii claims that the Program should "be evaluated with both the UCT and the TRC test metrics." Horii Direct Testimony at p. 14, ll. 12-13. Witness Horii also disputes the results of the Companies' UCT, and provided separate test results under the UCT, alleging that the UCT result for both DEC and DEP are 0.53 and 0.42, respectively. *See* Horii Direct Testimony.

Apparently, the contradictory results arrived at by the ORS are the result of further disagreement over the inputs used in the test. For example, Witness Horii alleges that the Companies utilized "flawed" transmission and distribution ("T&D") estimates in calculating the UCT. Horii Direct Testimony at p. 19, l. 19. However, Companies' Witness Duff explains that Witness Horii simply ignored that the "Companies applied the approved methodology for determining avoided T&D costs associated with EE and DSM programs." Duff Rebuttal Testimony at p. 15, ll. 20-22.

In characterizing the record in these proceedings as containing "no genuine issue as to any material fact," the Motion clearly ignores:

1. The Companies, as well as the intervening parties, presented testimony supporting the Program as fulfilling every applicable tenet of South Carolina law and the Commission's prior holdings when viewed through traditional, accepted EE/DSM measures; and
2. The ORS presented testimony in fundamental disagreement with critical aspects of the Companies' analysis and intervenor testimony, to ultimately conclude the Program does not fulfill such tenets.

The sufficiency of the Program under accepted EE/DSM standards in South Carolina remains a fundamental disagreement among the parties—which is separate from the dispute as to whether the Program falls within Solar Choice. As such, the Motion should be denied.

iii. There are additional genuine issues of material fact that are completely ignored by the Motion.

Aside from the issues outlined in detail above, there are numerous other genuine issues of material fact in this case that the Motion ignores, including those related to:

- **Customer costs arising from the Program**.
    - Witness Morgan states that the Program "create[s] significant additional customer costs." Morgan Direct Testimony at p. 3, l. 18.
    - Witness Duff clearly states that "it would cost the Companies' customers more if the Program was not implemented." Duff Direct Testimony at p. 8, ll. 26-27. Witness Duff points to the Companies' UCT evaluation, which supports that the total avoided costs will far exceed estimated costs of the Program. *See id*.
- **Characterization of the Program as an incentive for shareholders**.
    - Witness Horii argues that the Companies are somehow "monetizing the energy generated by customer-generators into shareholder incentives." Horii Direct Testimony at p. 7, l. 24.

- Witness Duff explains that these incentives were actually approved via settlement agreements to which the ORS was a party and that "customers retain nearly 90% of the net benefits achieved by the Programs." Duff Rebuttal Testimony at p. 17, l. 11. Witness Duff points to S.C. Code Ann. § 58-37-20 and the authorized EE/DSM Mechanisms as the authorization for such incentives and corresponding customer benefits. *See id*.

- **Expected "free-riders" under the Program**.

  - Witness Horii argues that the "Companies assumption of a 10% free riders value is unsupported and unreasonable." Horii Direct Testimony at p. 23, ll. 3-4.

  - Witness Duff states that "Witness Horii's calculations are inappropriate apples-to-oranges comparisons that render the analysis incorrect and uninformative" and "fundamentally flawed." Duff Rebuttal Testimony at p. 17, ll. 16-17; 21-22. Witness Duff supports this conclusion by noting that Witness Horii evaluated customers "who cannot even participate in the proposed Program as the basis for estimating free-ridership of the Program." Duff Direct Rebuttal at p. 16, l. 24; p. 17, ll. 1-2.

- **Relevancy of California's action when applying the plain language of Act 62 and this Commission's precedent**.

  - Witness Horii alleges that California is a "leader in energy efficiency . . . and residential solar" and implies that South Carolina should follow its lead by declaring that "solar is not classified as EE." Horii Direct Testimony at p. 10, ll. 5-7.

  - Witness Huber explains that in actuality, the Solar Choice Tariffs approved by this Commission "have been praised as being the 'new standard' in NEM across the country," and notes that this Commission has held that solar may act as EE. Huber Rebuttal Testimony at p. 6, ll. 1-2; p. 7, ll. 4-6. Witness Huber cites the Generic Order and industry trade press in support of his claims. *See id*.

These statements represent facts that are disputed by the parties and are key to the Commission's analysis in these proceedings. Yet, in representing that there are no genuine issues of material fact in dispute, the ORS ignores each of the above disputes. To be clear, the Companies strongly disagree with each of these statements made by the ORS, and have provided testimony presenting data-driven analyses disproving the same. Only by ignoring the above could the ORS claim there

are not issues in dispute. Given these other genuine issues of material fact, the Motion should be denied.

iv. There are additional genuine issues of material fact arising from the intervenors' testimony in these proceedings.

Although the Companies and the ORS disagree on a number of issues, the disputes that exist in these proceedings are not exclusive to the ORS and the Companies. SACE, SCCCL, Upstate Forever, Vote Solar, and NCSEA all submitted joint testimony in these proceedings in support of the Program—which the ORS disputes on multiple fronts, as outlined above. As such, there remain genuine issues of material fact between multiple parties, and the Motion should be denied.

b. <u>The Motion must be denied because ORS is seeking further inquiry to clarify the application of the law.</u>

South Carolina law makes clear that a motion for summary judgment should be denied when further inquiry may clarify the application of the law. *See Fleming v. S.C. Dept. of Corrections*, 952 F.Supp. 283, 286 (S.C. 1996); *Evening Post Publ'g Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 82 (2011) ("Summary judgment is not appropriate where further inquiry into the facts is desirable to clarify application of the law."). Given that the Motion seeks to overturn well-settled tenets of South Carolina law, the Commission would clearly benefit by further inquiry into the application of those laws, rather than merely accepting the ORS's novel premise in the Motion.

i. The ORS requests that this Commission find that solar generation may not serve as EE, which would change the current application of the law.

South Carolina law defines EE/DSM programs to specifically include those implemented "for the reduction or more efficient use of energy requirements of the utility or its customers

including, but not limited to . . . renewable energy technologies." S.C. Code Ann. § 58-37-20. As for the Commission, it expressly held that "behind-the-meter generation used by customer-generators shall be treated as energy efficiency or demand-side management resources." Generic Order at 52. In accordance with South Carolina law, the Program would literally reduce the energy requirements of the utility and its customers through a renewable energy technology (solar) that has been deemed equivalent to EE by this Commission.

The ORS apparently seeks a clarification or change in this well-settled law by claiming that solar is "self-generation, not EE . . . because it simply replaces some utility electricity purchases with electricity generated from the Solar PV." Horii Direct Testimony at p. 8, ll. 12-14. However, characterizing reduction in energy consumed from the grid as an EE/DSM measure is not a novel concept before this Commission. As explained by Witness Duff's direct testimony, the Commission previously approved a similar program as an EE/DSM measure in Docket No. 2009-190-E, and through CHP EE/DSM programs, as well as onsite generator load curtailment programs.

South Carolina law, the Commission's previous holding, and other existing EE/DSM programs make clear that solar generation may serve as an EE/DSM mechanism. Given that the ORS seeks to bar self-generation, in whatever form, from serving as part of an EE/DSM program, it must necessarily be seeking a change or clarification in the application of South Carolina law. As the moving party, ORS has the burden in its Motion to prove its reliance on settled law. Yet, ironically, ORS is the party seeking to amend South Carolina law in these dockets. As such, the Motion must be denied.

ii. The ORS requests that the Commission extend the Solar Choice prohibition on recovery of lost revenues to EE/DSM programs, which would change the current application of the law.

The Motion wrongly seeks to change application of existing law to mandate that any programs utilized in conjunction with Solar Choice are subject to Solar Choice's prohibition of recovery of lost revenue found in S.C. Code Ann. § 58-40-20(I). Specifically, the Motion suggests that the Commission may approve the Program "with the express condition that the Companies may not recover any lost revenues incurred as a part of the Programs." Motion at 5. To be clear, nowhere does Act 62 modify existing cost recovery under EE/DSM programs. As described above applying S.C. Code Ann. § 58-40-20(I) to EE/DSM programs violates a fundamental principle of statutory interpretation—*pari materia*. The principle of *pari materia*, as applied to these statutes, suggests that if the General Assembly had intended to prohibit the Companies from recovering net lost revenue under EE programs going forward by operation of S.C. Code Ann. § 58-40-20(I), it would have used the same term as it did when it initially authorized recovery of such amounts. However, it did not and only referred to "lost revenues" rather than "net income."

The ORS's argument ignores the plain meaning of South Carolina law, violates maxims of statutory construction, and would lead to absurd results. If the ORS's argument was adopted, it would mean that the Companies would be prohibited from recovering lost revenue under all programs in which Solar Choice customers may participate—which has no basis in South Carolina law. Ironically, it is the Companies and the intervening parties—who apply existing law without seeking any changes or clarification—that are in the better position to seek a Motion for Summary Judgment. Regardless, prohibiting the Companies from recovering net lost revenue under approved EE/DSM programs going forward would require a change in South Carolina law. As such, the Motion must be denied.

c. <u>The Motion must be denied because granting the Motion would violate due process.</u>

Granting the Motion and thereby effectively changing established law would deprive the Companies, as well as the other parties of record, of the due process afforded to them under South Carolina law—particularly given that the Commission would enact a change in the law without a complete record or an evidentiary hearing.[7] Therefore, the Motion is untimely and should be denied.

C. Conclusion.

The Commission must deny the Motion because there remain "genuine issues of material fact" in this case when viewing all facts and evidence in the light most favorable to the Companies. The ORS places several issues before the Commission seeking to change the current application of South Carolina law, which would be benefited by further inquiries into the facts. Additionally, the Motion is untimely and it would violate the Companies' and intervenors' due process rights by changing well-settled law and regulatory policy without so much as a complete record or hearing. The Companies have provided more than the "scintilla of evidence" required to survive the Motion. As such, the Companies respectfully request that the Motion be denied.

V. RESPONSE IN OPPOSITION TO REQUEST FOR ORAL ARGUMENT

Given that there remain genuine issues as to material facts in these proceedings and the record has not been fully developed, the Companies respectfully request that the Commission deny the ORS's Request for Oral Argument as to "whether the Programs are prohibited under the laws of the State of South Carolina." Request for Oral Argument at 3. However, to the extent that the Commission desires to hear oral arguments related to whether the Motion itself surpasses the

[7] Administrative agencies are required to meet minimum standards of due process. S.C. Const. Art. 1, § 3: *Smith & Smith, Inc., v. S.C. Public Service Commission*, 271 S.C. 405, 247 S.E.2d 677 (1978).

applicable legal standards, the Companies would welcome the opportunity to present the Commission with oral arguments as to why the Motion should be denied on multiple accounts.

REQUEST FOR RELIEF

For the reasons explained above, the Companies respectfully request that the Commission issue an order (i) affirming the above requested legal standards, (ii) limiting the testimony and evidence offered at the hearing in these proceedings to that which is consistent with the applicable legal standards, and (iii) denying the Motion and Request for Oral Argument and request such other relief as the Commission deems just and proper.

Respectfully submitted this 7th day of October, 2021.

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